

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment by)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment)	

**REPLY COMMENTS OF THE POWER COALITION IN OPPOSITION
TO PETITION FOR DECLARATORY RULING**

CenterPoint Energy Houston Electric, LLC
Dominion Energy South Carolina (f/k/a South Carolina Electric & Gas Company)
Florida Power & Light Company
Gulf Power Company
Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana
Virginia Electric and Power Company
d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina

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Dated: November 20, 2019

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The members of the POWER Coalition, by their undersigned counsel, and pursuant to the Public Notice of the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding,¹ submit these reply comments in opposition to the Petition for Declaratory Ruling of CTIA, and respectfully request that the Commission reject CTIA’s demands that it unlawfully expand the scope and breadth of Section 224 of the Communications Act, and its pole attachment rules.²

I. INTRODUCTION

The POWER Coalition members (“Pole Owners Working for Equitable Regulation”) are: CenterPoint Energy Houston Electric, LLC, Dominion Energy South Carolina, Florida Power & Light Company, Gulf Power Company, Vectren Energy Delivery of Southern Indiana, and

¹ Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment On WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling, Public Notice, WT Docket No. 19-250, WC Docket No. 17-84 and RM-11849, DA 19-913 (rel. Sept. 13, 2019). Because the POWER Coalition’s comments are limited to the Section 224 pole attachment issues raised in CTIA’s Petition for Declaratory Ruling, these comments are filed only in WC Docket No 17-84. *See also In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Order Granting Extension of Time, DA 19-978 (rel. Sept. 30, 2019) (directing parties to file all comments that exclusively concern pole attachment issues only in WC Docket No. 17-84).

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (WT Docket No. 17-79), *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), *WIA Petition for Rulemaking*, *WIA Petition for Declaratory Ruling*, and *CTIA Petition for Declaratory Ruling* (RM-11849), Petition for Declaratory Ruling of CTIA, filed Sept. 6, 2019.(“Petition” or “CTIA Petition”).

Virginia Electric and Power Company d/b/a Dominion Energy North Carolina and d/b/a Dominion Energy Virginia. The individual members of the POWER Coalition each are investor-owned electric distribution utilities (“IOUs”), and pole owners within their respective geographic service areas.³

The members of the POWER Coalition concur in, and fully support the reply comments of the Utility Associations,⁴ and submit these further reply comments in opposition to CTIA’s request for a declaration that would expand the Commission’s Section 224 pole attachment jurisdiction to reach all utility-owned “light poles.”

II. THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY TO REQUIRE ACCESS TO “LIGHT POLES” AND THERE IS NO EVIDENCE IN THE RECORD DEMONSTRATING THAT SUCH A DRASTIC MEASURE IS NECESSARY.

Neither the CTIA Petition nor any of the comments filed to support it demonstrate that the Commission has the statutory authority to regulate what the Petition describes as “light poles,”⁵ nor do they demonstrate a need for any such regulation. Both the unambiguous text of Section 224 of the Communications Act, and the binding judicial precedent interpreting Section 224 make clear that the Commission’s jurisdiction does not extend to “light poles.”⁶ Moreover, the rationalizations that CTIA provides for expansion of the Commission’s authority are meritless, and no commenter has actually demonstrated that wireless service providers require access to “light poles” to deploy

³ Complete descriptions of each POWER Coalition member are provided in their initial Opposition in WC Docket No. 17-84, filed on October 29, 2019 (“POWER Coalition Comments”).

⁴ Reply Comments in Opposition to Petition for Declaratory Ruling of Edison Electric Institute, Utilities Technology Council, and National Rural Electric Cooperative Association (filed Nov. 20, 2019).

⁵ Although the Petition does not attempt to define “light poles,” for purposes of the POWER Coalition Comments, and these reply comments, “light poles” are understood to be poles that do not support any component of a utility pole owner’s electric distribution system.

⁶ 47 U.S.C. § 224; *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002).

Fifth Generation (5G) wireless services. A number of utility companies already voluntarily provide access to “light poles” that they own or control, and do so on reasonable terms and conditions.⁷

With respect to the Commission’s statutory basis for the regulation of “light poles,” CTIA, and advocates of the CTIA Petition, misinterpret the decision of the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) in *Southern Co.* to merely exclude interstate electric transmission facilities from the Commission’s jurisdiction.⁸ Not so. The Eleventh Circuit concluded that Congress’s grant of authority to the Commission under Section 224 is constrained by the language of Section 224(a) and Section 224(c), and therefore, does not extend to all poles owned or controlled by a utility, as CTIA asserts.⁹ To the contrary, the Eleventh Circuit determined that the unambiguous language of Section 224 limits the Commission’s jurisdiction to “utilities’ local distribution facilities.”¹⁰ Based on the core holding in *Southern Co.*, the Commission’s authority under Section 224 cannot be construed to include “light poles” and other components of a utility’s infrastructure that are not part of its local electric distribution system.¹¹ However, without regard to *Southern Co.*, several commenters have asserted that the Commission’s jurisdiction extends to any structure that is owned or controlled by a utility, and that could be characterized as a “pole.”¹² This contradicts the clear intent of the Act, and ignores prior guidance

⁷ Opposition to Petition for Declaratory Ruling by Edison Electric Institute, Utilities Technology Council, and National Rural Electric Cooperative Association (filed Oct. 29, 2019) (“Utility Association Comments”) at 11-13. For example, Dominion Energy Virginia has permitted access to its wooden light poles (without electric distribution facilities) for years, and currently is working in cooperation with wireless service providers to develop specifications for non-wooden light poles that could safely and reliably support wireless antenna attachments.

⁸ See CTIA Petition at 23. See also Comments of AT&T, filed Oct. 29, 2019 at 23-24 (“AT&T Comments”); Comments of Crown Castle International Corp., filed Oct. 29, 2019 at 39-40 (“Crown Castle Comments”).

⁹ Poles need to be within the language of the definitions found in Section 224(a) to fall within the Act’s jurisdiction unless they are specifically used for wire communications. See *Southern Co.*, 293 F.3d at 1349. Section 224(c) similarly limits the FCC’s jurisdiction in that it “removes the FCC’s authority to regulate pole attachments in any place where a state has elected to do so.” *Id.* at 1345.

¹⁰ *Id.*

¹¹ As noted in the POWER Coalition Comments, the court in *Southern Co.* described local distribution facilities to be comprised of “substations, underground cables, poles, overhead conductors, transformers, service drops, and meters that supply power to customers.” POWER Coalition Comments at 5 (quoting *Southern Co.*, 293 F.3d at 1345).

¹² See, e.g., Comments of Verizon, filed Oct. 29, 2019 at 3.

from the United States Supreme Court which cautioned that Section 224 should not be interpreted in such a broad fashion.¹³

CTIA, and the proponents of its Petition, also fail to consider perhaps one of most important distinctions between the electric distribution poles subject to Section 224, and utility-owned “light poles”: only the latter implicates property rights of third parties that arise under private contracts and the state laws that apply to contracts governing light poles.¹⁴ In fact, with respect to the members of the POWER Coalition, “light poles” typically are installed in accordance with the custom order of a specific utility customer, who then is contractually bound to compensate the utility for the costs of installation, maintenance, and operation of such poles.”¹⁵ In turn, the utility maintains pole ownership, and provides its customer contractual assurances that the pole will be used for the function intended by the customer’s order, and in accordance with the customer’s expectations.¹⁶ Such contractual arrangements often do not contemplate that a pole will be used to accommodate wireless devices or equipment, or that a pole will be modified or replaced for that purpose.¹⁷ Indeed, in Florida, these contractual arrangements are subject to tariffs filed by the IOUs with the Florida Public Service Commission. Neither CTIA, nor its supporters address the distinct public policy concern of impeding on private contract rights and state law, or explain how the Commission may mitigate these concerns, if access to “light poles” were to be mandated under Section 224.

¹³ See *Nat’l Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 329 (2002) (“[A] literal interpretation of ‘any attachment’ would lead to the absurd result that the Act would cover attachments such as, *e.g.*, clotheslines.”).

¹⁴ As discussed more fully in the POWER Coalition Comments, “light poles” also are physically much different than electric distribution poles, and because they are designed to support only “lighting,” they are not suitable in most cases for wireless attachments. POWER Coalition Comments at 9-10.

¹⁵ *Id.* at 8-9. See also Utility Association Comments at 3-4.

¹⁶ See POWER Coalition Comments at 8-9.

¹⁷ See *id.*

Moreover, while the Commission’s jurisdiction and authority under Section 224 arguably preempts state law governing the rates, terms, and conditions of pole attachments, it is far from clear that any preemptive authority would extend to IOUs’ contracts with third parties for “light poles”, whether private or subject to state-approved tariff. There are no reported cases generally interpreting the parameters of the Commission’s preemptive authority under Section 224, much less any reported cases specifically interpreting the Commission’s authority to preempt state tariffs and private contracts applicable to “light poles” that provide for the benefit of third parties to any relationship between the pole owner and attachers. The Commission should not now, and not on this sparse record, wade into this morass of jurisdictional and property rights issues associated with access to utility-owned “light poles.”

III. CONCLUSION

For the reasons set forth in their initial comments, and these reply comments, the members of the POWER Coalition urge the Commission to deny all declaratory relief requested in the CTIA Petition with respect to Section 224 of the Act and the Commission’s pole attachment rules.

Respectfully submitted,

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